specifically whether she understood the will and she said she did. The fact that in reply to a question he said "she appeared to understand all" does not in our view diminish or throw doubt on the answer he first gave about asking her in Malay whether she understood the will. On the evidence of Mr. Yong Kung Lin, Mr. Subramaniam and the doctor the learned trial Judge could not have come to any other conclusion than that (to quote the words of Parke B. in *Barry v. Butlin*[1]): "the instrument so propounded was the last will of a free and capable testator." As regards the testatrix's capacity, the medical evidence establishes beyond doubt that, though old and feeble, she was in full possession of her mental faculties.

Mr. Ek Teong has further submitted that the learned trial Judge was in error in holding that the burden of proof of undue influence lay on the defendant-appellant. The law is set out in *Theobald* on Wills, 10th ed. as follows (at p. 26):—

"Whenever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, it is for those who propound the will to remove such suspicion. The fact that the will is prepared by or on the instructions of the person taking a benefit under it is a circumstance raising such suspicion. To invalidate such a will, however, there must be evidence of the actual exercise of some undue influence. And the influence of a person standing in a fiduciary relation to a testator may lawfully be exercised to obtain a will or legacy, so long as the testator thoroughly understands what he is doing and is a free agent; and the burden of proof of undue influence lies upon those who assert it."

In *Tyrrell v. Painton*[2], Lindley L.J. says (p. 157):—

"The rule in **Barry** v. **Butlin**[1], **Fulton** v. **Andrew**[3], and **Brown** v. **Fisher**[4], is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will."

In our view, the plaintiff-respondent proved affirmatively that the testatrix knew and approved of the contents of the will, and the appellant failed to prove undue influence. The appeal was accordingly dismissed with costs.

Appeal dismissed.

DOWSE v. DOWSE

[Divorce Jurisdiction (Rigby J.) July 6, 1956]

[Penang — Divorce Petition No. 8 of 1955]

Divorce — Collusion — Attempt by husband to induce wife to refrain from defending the petition.

In this case the learned Judge, on the application on behalf of the Attorney-General, found that there had been collusion in obtaining a decree of divorce, in that the husband had induced the wife by a money payment to refrain from defending the petition. The learned Judge rescinded the decree *nisi* and ordered the petitioner to pay the costs of the intervention by the Attorney-General.

Case referred to:—

(1) *Lowndee v. Lowndee* (1950) P. 231.

DIVORCE.

F. G. Pooley for the petitioner.

O. L. Phipps for the respondent.

F. G. Cooke (Federal Counsel) for the Attorney-General.

Rigby J. (delivering oral judgment): — This is an application, on behalf of the Attorney-General, Federation of Malaya, to rescind a *decree nisi* granted to the Petitioner by this Court on the 8th February, 1956. On the evidence as disclosed in the Attorney-General's application it seems to me abundantly clear that there was a deliberate attempt in this case by the Petitioner to induce his wife, by a money payment, to refrain from defending the petition. In the words of Willmer J. in the case of *Lowndee v. Lowndee*[1]:—

"That appears to me to amount to no more and no less than an attempt to obtain the judgment of this Court not on the merits of the case, but rather by way of arrangement between the two parties. And an arrangement whereby the husband is to obtain his freedom irrespective of the merits of the case strikes me as being clearly something which does in fact tend to pervert the course of justice.

The *decree nisi* is rescinded. The petitioner will pay the costs of the intervention made by the Attorney-General.

Perhaps I ought to add that I am fully satisfied after having seen the correspondence as disclosed in the application by the Attorney-General and the answer thereto, that the petitioner's Solicitors were in no way concerned with the attempt at collusion made by the petitioner.

Costs to be taxed, if not agreed.

Order accordingly.